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The Civil Law Trust

Maurizio Lupoi

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The Civil Law Trust

*Maurizio Lupoi**

TABLE OF CONTENTS

I.	INTRODUCTION.....	967
II.	THE ALLEGED INCOMPATIBILITY OF TRUST WITH CIVIL LAW STRUCTURES.....	968
	A. What is Meant by "Trust"?	968
	B. Why Refer to "Civil Law" Generally?	969
	C. Looking for Civil Law Trusts	970
	D. Civil Law Trusts of Today	971
	E. Civil Law Trusts as the Foundation of the English-Model Trust	973
	F. The Basic Reasons Why Trusts are Compatible with Civil Law Structures	976
	G. The "Hague Convention" Trusts.....	979
III.	THE ALLEGED REQUIREMENT THAT TRUSTS MUST BE FOREIGN TO BENEFIT FROM THE HAGUE CONVENTION.....	980
	A. Choice of Law	980
	B. The Required Foreign Element.....	982
IV.	TRUSTS IN ITALY	983
	A. The Trust Interno (Domestic Trust) in Principle.....	983
	B. The Trust Interno in Practice.....	985
V.	CONCLUSION.....	988

I. INTRODUCTION

It is generally held that trusts are incompatible with the basic assumptions of civil law systems. In order to discuss this statement one would have to inquire, first, what is meant by the term "trusts"; second, what assumed common characteristics of the civil law systems are being envisaged and declared to be incompatible with trusts; and third, why those characteristics should be incompatible with trusts.

It is also commonly held that the Hague Convention of 1984 on the law applicable to and the recognition of trusts concerns only those trusts that are foreign to the jurisdiction in which the

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rules of the Convention are invoked.¹ In order to discuss this statement, one would have to inquire when a trust is sufficiently "foreign" to warrant the protection of the Convention.

This article asserts that trusts are not incompatible with the basic assumptions of civil law systems. Moreover, the Hague Convention does not require an element of foreignness other than the simple fact that a trust is governed by a foreign law. These two submissions are obviously interrelated and, once they are accepted, the conclusion follows that the Hague Convention allows ratifying civil law countries to have the same access to trusts that is peculiar to their common law counterparts. In other words, this article contends that trusts can be formed in Italy and in Holland just as they would in England or in Tennessee, provided they are governed not by Italian or Dutch law, but by English or Tennessee law.

II. THE ALLEGED INCOMPATIBILITY OF TRUST WITH CIVIL LAW STRUCTURES

A. *What is Meant by "Trust"?*

It is now fashionable to refer to the "Anglo-American" trust. This terminology is most confusing, for it puts in the same basket the laws of each state of the United States, England, Australia, Canada, New Zealand, the laws of offshore jurisdictions, and many others.

Some of those laws have a purely statutory origin, and a recent one at that.² While some jurisdictions have a separate equity jurisdiction, others have stated that they possess an inherent equity jurisdiction. Moreover, the trust structures prevailing in some of those countries have an overwhelming tax-planning purpose.

Looking at the rules, those relating to the constructive trust provide a good example of the remarkable differences between the long-standing English view and the remedial view prevailing in the United States, that is now making significant inroads in Canada, Australia, and possibly England. The rules of the offshore jurisdictions relating to the liability of trustees and to exclusion clauses are different from the English ones. The same is true with regard to the rules relating to the relationship between settlor and trustee or the rights of the beneficiaries.

One might say, as many do, that this is a purely academic view and, more specifically, a view that shows how comparative

1. See generally Convention on the Law Applicable to Trusts and on Their Recognition, July 1, 1985, reprinted in MAURIZIO LUPOI, INTRODUZIONE AL TRUSTS app.1 (1994), and 2 INTERNATIONAL TRUST LAWS app. 51 (John Glasson ed. 1999).

2. For example, Montana did not pass its Trust Code until 1989. See generally MONT. CODE ANN. §§ 72-33-101 to 72-34-517 (1997). See *infra* note 4.

law scholars can confuse the issues and create insurmountable difficulties where none exist. These critics would say that there is a "common core" at the basis of the Anglo-American trust. That could hardly be denied, but, as will be shown, when one tries to define what belongs to the common core, the conclusion is reached that such a common core is not unique to the common law systems. Indeed, as this article explains, there is new and specific evidence that the trust belongs to the civil law, whence it was imported in England during the formative period of the Chancellor's jurisdiction over trusts.³

Finally, if classifications must be used, then it is most favorable to distinguish among trusts as follows: the English-model trust; the international-model trust;⁴ and the civil law model trust.

B. Why Refer to "Civil Law" Generally?

The so-called dialogue between civil law and common law was the basic feature of post-World War II comparative law. It was such a novel attitude that each of the two participants to the dialogue stressed the unifying elements within its own group and the differences with the other group. Civil law scholars and common law scholars emerged as two monoliths. Indeed, as René David's 1964 book on the great legal systems stated, all civil law countries belonged to one family and all common law countries to another.⁵ After a while, and to the present day, new classifications have been proposed. Most of the proponents came from the civil law, including the many first-rate academic law scholars who left Europe during the late 1930s and came to teach in the United States. They all tended to break the civil law family with which they were more familiar into smaller families.

Such classifications should be greeted with skepticism. The different attitudes taken by the civil law systems toward trusts are evidence of fundamental dissimilarities among them. If trusts contradicted basic assumptions of the civil law systems, as the prevailing view asserts, the civil law systems all ought to react in the same way, that is, by rejecting trusts. As will be shown, this is not the case.

The term "civil law" still may be used to designate those legal systems that are commonly thought of as belonging to the civil law. The self-referencing nature of this approach is obvious and its usefulness will lie in helping to prove that "civil law" has no standing as a legal category.

3. See *infra* Part II.E. (discussing the early development of *confidentia* in civil law countries).

4. This is a quite recent development, which originated with the Jersey statute of 1984.

5. See generally RENÉ DAVID & JOHN E. C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY (John E. C. Brierley trans., Stevens & Sons 3d ed., 1985) (1966).

C. Looking for Civil Law Trusts

There are basically two ways to approach the civil law in the matter of trusts. One is to refer to the vague notion of the "common core." The other is to define the trust in comparative law terms and investigate whether it is to be found in civil law countries.

I would submit that an appropriate definition of the trust in comparative law terms would include the following elements:

- (1) the transfer of property to the trustee, or a unilateral declaration of trust;
- (2) the lack of commingling between said property and other elements of the trustee's estate (segregation);
- (3) the loss of any power of the settlor over said property;
- (4) the existence of beneficiaries or a purpose, and the resulting functionalism of the exercise of the right transferred to the trustee; and
- (5) the imposition of a fiduciary component upon the exercise of the trustee's rights, with principal reference to conflicts of interest.⁶

One should evaluate whether further elements should be introduced. Clearly, the more elements that are added to the five elements listed above, the less comparative value the proposed structure would have. The middle path chosen above seems sufficiently discriminating.

The only other attempt to identify the essential characteristics of the trust from a comparative viewpoint is that made by Professor Donovan Waters in a course held at The Hague in 1995.⁷ The construction proceeds along lines that are substantially similar to the characteristics presented above, with three important distinctions that serve to clarify this article's comparative approach.

Professor Waters stresses that the trustee "must have full title to the property under administration as opposed to some lesser right such as possession, detention or factual control."⁸ However, this view is erroneous, for the trustee may well be trustee of a "lesser right" such as possession, detention and even factual control. One should keep in mind that any legal entitlement may be the subject matter of a trust. The point is

6. See generally MAURIZIO LUPOI, TRUSTS, ch. IV (1997) (an English translation of this book will be published by Cambridge University Press in the Spring of 2000).

7. Donovan W. M. Waters, *The Institution of the Trust in Civil and Common Law*, 252 RECUEIL DES COURS 113 (1995).

8. See generally *id.* at 221-25 (discussing the trustee's "control" of the property).

that such entitlement must be completely transferred to the trustee: *the entitlement is fully transferred; but the entitlement need not be full.*

Professor Waters identifies an essential characteristic of the trust in the existence of a tracing action in favor of the beneficiaries.⁹ He also observes that no civil law system permits beneficiaries under a management situation to have this kind of protection, except in cases where they are defined as owners.¹⁰ On both accounts, Waters is unfortunately mistaken. The first factor, the tracing action, is problematic because it comes from a "proprietary" view of the position of the beneficiaries with which this author disagrees. As far as the second factor is concerned, the availability of remedies in civil law systems, it is untrue that civil law systems do not possess methods of protection comparable to those provided by tracing. It should be noted in passing that Italian law has no problem in giving significance to notice, and in situations comparable to those that allow tracing, it uses the far wider and more penetrating notion of good faith.

Furthermore, Professor Waters highlights the independence of the trustee with regard to the settlor and the beneficiaries.¹¹ Beneficiaries, however, are an option in trusts. To concentrate the concept of trust on the beneficiaries is improvident in the comparative context for two reasons. First, it points the civil lawyer in the direction of structures that in principle should be kept separate from trusts, from the contract in favor of third parties to foundations to *fideicommissa*. Second, it underestimates the relevance of the enormous expansion of trusts for purposes, charitable or otherwise. These trusts are important not only because they have become extremely frequent in the international trust model, but also because it is thanks to these trusts that English law is turning its attention to a reconsideration of the very notion of beneficiary.

D. Civil Law Trusts of Today

It is well known that Liechtenstein enacted a trust law in 1926.¹² Some provisions of the law call for close scrutiny:

*Treuhänder (Trustee oder Salmann) im Sinne dieses Gesetzes ist diejenige Einzelperson, Firma oder Verbandsperson, welcher ein anderer (der Treugeber) bewegliches oder unbewegliches Vermögen oder ein Recht (als Treugut), welcher Art auch immer, mit der Verpflichtung zuwendet, dieses als Treugut im eigenen Namen als selbständiger Rechtsträger zu Gunsten eines oder mehrer Dritter (Begünstigter) mit Wirkung gegen jedermann zu verwalten oder zu verwenden.*¹³

9. See *id.* at 229-30.

10. See *id.* at 341-34.

11. See *id.* at 226.

12. PERSONEN- UND GESELLSCHAFTSRECHT [PRG] art. 897 (Liech.).

13. *Id.*

One cannot fail to note the careful wording of this article. "Zuwendet" shows the transfer to the trustee, who holds the property "im eigenen Namen als selbständiger Rechtsträger," in his own name as an owner in his own right, subject, however, to his obligations to the beneficiaries. Further, the trustee's ownership as well as his obligations are effective towards all the world: "mit Wirkung gegen jedermann."

If Liechtenstein has one of the oldest enactments, barring of course Chile and Colombia with their old *fideicomisos*, Argentina has the newest:

*Habrà fideicomiso cuando una persona (fiduciante) transmita la propiedad fiduciaria de bienes determinados a otra (fiduciario), quien se obliga a ejercerla en beneficio de quien se designe en el contrato (beneficiario), y a transmitirlo al cumplimiento de un plazo o condición al fiduciante, al beneficiario o al fideicomisario. Sobre los bienes fideicomitados se constituye una propiedad fiduciaria.*¹⁴

Here, too, the comparative terms of trusts, as submitted above, can be clearly discerned. Notable are the transfer to the trustee (*transmita*), the obligation of the trustee, and the reference to purposes. The last element, however, is not found in the law of Liechtenstein, which closely followed the English Trustee Act of 1925.¹⁵

As to the fiduciary nature of the relationship, the Spanish word "*fiduciario*" and the German "*Treuhänder*" call for no elaboration.

A third example of civil law trust arises from the Italian civil code, as modified in 1975.¹⁶ Here, however, no comparable word exists to indicate a fiduciary relationship.

*Ciascuno o ambedue i coniugi, per atto pubblico, o un terzo, anche per testamento, possono costituire un fondo patrimoniale, destinando determinati beni, immobili o mobili iscritti in pubblici registri, o titoli di credito, a far fronte ai bisogni della famiglia.*¹⁷
*L'esecuzione sui beni del fondo e sui frutti di essi non può aver luogo per debiti che il creditore conosceva essere stati contratti per scopi estranei ai bisogni della famiglia.*¹⁸

This would appear to be a typical family trust.

The unilateral declaration of trust by the spouses is provided for, as well as a trust formed by a third party in favor of the family by means of transferring assets to the spouses as trustees. This provision is unique to the Italian *fondo patrimoniale*.

Nevertheless, the word "fiduciary" is nowhere to be found. Yet, a fiduciary component was included in the five basic elements that define a trust for comparative law purposes. Of course, no student of comparative law would terminate his

14. Law No. 24441, Jan. 5, 1995, arts. 1, 11.

15. See Trustee Act, 1925, 15 & 16 Geo. 5, ch. 19 (Eng.).

16. See CODICE CIVILE [C.C.] art. 167 (Italy).

17. *Id.*

18. *Id.* art.170

research on the doorstep of the law in action. Whether or not the fiduciary component is plainly stated in the legislative instrument, what matters is how the obligations of the trustee are appraised by those who apply the statute to the actual occurrences of life.

Many other examples of civil law trusts exist.¹⁹ However, the three versions described above should be sufficient to show that they are likely to fit properly not only within the original comparative law definition, but probably within much narrower definitions.

E. *Civil Law Trusts as the Foundation of the English-Model Trust*

While the origin of trusts in England will not be discussed herein, a few words are necessary to explain the results of research I am conducting on civil law trusts.

In short, ample evidence exists that the testamentary secret and semi-secret trusts were well known in Europe in the sixteenth and seventeenth centuries and that they were called "*confidentia*," exactly the same name originally attributed to trusts.²⁰ Over a dozen judgments of the Roman Rota, the tribunal of the Papal State, several judgments from France and Piedmont, and, equally importantly, opinions by authors from France, Spain, Germany, and Italy all agree on a structure of the *confidentia* that is identical to the structure of the trust. What follows below are excerpts from some of the sources.²¹

- (1) *Iulius, Alexij nepos, fuerat condemnatus in poenam vitae & confiscationis bonorum; Alexius timebat ne reliquendo illum haeredem bona vendicarentur a Fisco; ideo cogitavit facere alium haeredem fiduciarium, qui bona illi servaret, ac tempore quo tutus erat restitueret.*²²
- (2) *Ludovicus timebat ne bona sua devenirent ad fiscum propter inquisitionem & imputationem criminalem, quod duo ex filiis*

19. For instance, Panama, Japan, Ecuador with its "*fideicomiso mercantil*," Israel, Venezuela from 1956, Mexico, Peru with its *comisión de confianza* in commercial matters, and Louisiana. A complete overview of civilian trust laws can be found in TRUSTS, *supra* note 6, at ch. V.

20. See, e.g., R. H. Helmholz, *The Early Enforcement of Uses*, 79 COLUM. L. REV. 1503, 1508 n.31 (quoting *In re Testament of Richard Middleton*, Rochester Act Book DRb Pa 3, f. 481 v. (1464) ("*feoffavit eos ex confidentia ad usum suum et non ad usum illorum*" ("that he enfeoffed them out of trust to his [own] use and not to their use")); J. H. Baker, *The Use Upon a Use in Equity 1558-1625*, 93 L. Q. REV. 33, 37 (quoting *Katherine, Duchess of Suffolk v. Herenden*, Brit. Lib. MS. Lansdowne 1067, f. 27 (14 Eliz. I (1572)) ("*tout ceo conveyance fuit sur trustee et confidence a sa use*")); *Cook v. Fountain*, [1672] 3 Swans. 585 ("*Uses at common law were nothing but secret confidences.*"); *Abbot of Bury v. Bokenham*, [1535] 1 Dyer 7b ("*The use in nothing in law, but is a confidence.*").

21. There would no point in being overpedantic by providing the full bibliographical reference of each source. I shall use the shortened abbreviations that were current at the time.

22. Rota Romana, dec. 557 cor. Cavalerio, 24.1.1614, *Romana haereditatis de Alexijs*.

- suis habuerint conversationem cum banditis. Secundum confecit testamentum ad favorem Didonis uxoris haeredis universalis.²³
- (3) *D. Laurentius anno 1649 condidit suum ultimum testamentum, in quo sibi haeredem universalem instituit D. Antonium eius fratrem cum illo vinculo fideicommissi, quod declarabit P. Cherubinus religiosus Sancti Dominici, cum quo testator ipse asseruit contulisse eius voluntatem.*²⁴
- (4) *Maginus Poço, mercator civitatis Barcinonae, haeredem instituit Paulum Ferrer "pregant y encarregant ly done la mi heretat y bens al posthumo . . . que la dicta senora muller mia aporta en son ventre, venint à llum vixa, de la manera y abla forma que li apparra per lo que de el tinct molta confiança.*²⁵
- (5) *Quis neque testamento, neque codicillis rogatur, sed domestica cautione [si noti la terminologia di D. 30.103], vel chyrographo obligat se ad praestandum ei, qui capere non potest velut ut haereditas filio spurio restituatur vel concubinae.*²⁶
- (6) *Quidam nobilis patavinus, relicta legitima filio suo dilapidatorum rerum suarum, instituit sibi duobus consanguineis, gravaverat eos, ut natis ex eo filio, filiis legitimis eiusdem haereditatem restituerent.*²⁷
- (7) *Guido Jordanus scripta haerede Virginia eam gravavit moriendo restituere haereditatem ei, cui ipse oretenus communicaverit. Virginia declaravit, etiam pro exoneratione conscientiae, veram testatoris voluntatem fuisse quod erigeretur Canonatus.*²⁸
- (8) *Johanna habens ex viro iam defuncto duos filios coelibes et ex duobus autem filiis uxoris praedefunctis quatuor nepotes, donationem fecit de quibusdam praediis uno ex filiis, sub ea lege, ut moriens teneretur praedia relinquere pro medietate uni ex nepotibus unius filii, quem ipsa oretenus sibi communicaverit.*²⁹
- (9) *Octavius dubitabat ne si Federicum patrem, Aquaspartae ducem, haeredem institueret, commodum haereditatis perveniret ad Principem Sancti Angeli, cui Dux Federicus administrationem concesserat, & alios creditores eiusdem patris; deinde testamentum licentia patris condidit favore Ducis Alexandri Sfortiae.*³⁰
- (10) *Antoine Brun institue Foy d'Allegret, sa femme, son heritière universelle, à la charge de rendre son heritage, ou partie, a celuy de ses deux fils aînez qui luy seroit le plus obéissant lorsqu'il auroit atteint l'âge de vingt-six ans, suivant l'avis des sieurs d'Allegret ses frères.*³¹
- (11) *Si pater sit dilapidator bonorum filii, poterit mater bona mente exhaereditare filium, ne pater administret bona filii, modo instituat confidentem, qui postquam filius sit sui iuris effectus, illi haereditatem restituat cum fructibus.*³²

23. Rota Romana, dec. 901 cor. Buratti, 4.2.1626, Spoletana haereditatis seu Confidentialiae.

24. C. A. De Luca, Conf. haer. inst., cap. 63.

25. Cancer., var. l. 1, cap. 1.

26. Mantica, coniect. ult. vol., l. 10, tit. 4.

27. Torre, de pact. fut. succ., l. III, cap. VII.

28. De Luca, Theatrum, l. X, disc. 182.

29. De Luca, Theatrum, l. X, disc. 183, Anconetana successionis.

30. Rota Romana, dec. 238 cor. Calataiu, 23.2.1674, Romana census.

31. Parlamento of Parigi, 1675.

32. C. A. De Luca, Conf. haer. inst., cap. II.

- (12) *Nelli restanti miei beni tutti ne instituisco, e nomino, quanto sia per una metà solamente, mio Erede universale fiduciario l'illustrissimo e eccellentissimo sig. Ugo Fieschi, quale dovrà disporre delle detta metà de' miei beni & eredità in queglii usi, e in quelle persone in tutto e per tutto come gli ho confidato secretamente in voce.*³³
- (13) *Iohannes Baptista tres filios masculos adhuc adolescentulos habebat et nesciebat qualis quisque indolis esset exiturus. Per testamentum fratrem suum Christophorum fiduciarium nuncupavit.*³⁴

It is astounding to find in these examples the same purposes seen in English medieval trusts: benefiting an illegitimate son; preventing the creditors of the intended beneficiary from touching the trust fund; requiring the trustee hold property for beneficiaries who could not be heirs because the state would take the assets;³⁵ allowing the trustee to perform the duties of a court-appointed tutor; or granting to the trustee a discretionary power³⁶ to choose among the decedent's sons. In decided cases and in opinions rendered by jurists, one finds exactly the same rules that eventually became rules of English law. Furthermore, one encounters the same words of advice found in present-day textbooks—for instance, the secret trustee should write himself a note of the wishes of the secret settlor. Lastly, these cases and opinions illustrate the fundamental rule that the creditors of the trustee—even if a secret trustee—cannot attack the assets bequeathed to him under a will subject to a secret or semi-secret trust.

Such a wealth of civil law authority, which originates in the thirteenth and fourteenth centuries—for example, in an opinion given by Bartolus—and which closely parallels the English trust, both functionally and in terms of the applicable rules can only mean that the English Chancellors, whose civil law background is well known, drew from them without mentioning the sources they were using.

All that was before the great codifications of the nineteenth century. Thus, the question arises, did such codifications dissipate a tradition extending for many centuries? Although codes have no bearing on traditions, they may create misunderstandings as to traditions, especially because they are often regarded as sweepers of the past. If they really had swept the traditions away, how can we explain the examples of civil law trusts that, as demonstrated above, do exist?

33. Last Will and Testament of 31st January 1740, which was the subject of litigation before the Senate of Genoa in 1777 (Fieschi Doria ev. Conservatorio Fieschi).

34. Rota Romana, dec. 648, cor. Olivato, 22.1.1768, Romana successionis.

35. For instance, persons who had been outlawed would not be allowed to be heirs.

36. Discretionary trusts were not uncommon in the sources.

F. *The Basic Reasons Why Trusts are Compatible
with Civil Law Structures*

It should be clear by now that language in this article regarding civil law trusts refers not to the so-called "trust-like devices" or, as the Hague Conference that prepared the Convention of 1984 put it, "analogous devices,"³⁷ but to institutions that are properly homologous to trusts in comparative law terms.

The mere fact that trusts exist in civil law countries should prove the point that there is no basic incompatibility with civil law structures. Why, then, is the opposite view held so unanimously? The simple answer is that common law scholars have not attempted a comparative study of the civil law institutions, while civil law scholars have not attempted a comparative study of trusts. Each of the two groups has taken at face value what the other propounds. Such an approach is doomed, and, indeed, has led to mutual misunderstandings. What follows is a brief enumeration of the basic weakness of each approach.

Common law scholars have forgotten that trusts would have been classified as contracts had the common law courts developed a contractual form of action one century before *assumpsit* and *indebitatus assumpsit* took root. The French proposed legislation on *fiducie* begins by stating, "*La fiducie est un contrat,*" a statement that is in no way heretical.³⁸ Only a chronological twist prevented trusts from being contracts. Having overlooked this point, common law scholars underrate the agreement component of trusts. On the other hand, if a recent doctrinal attempt to sway trusts into the contractual area³⁹ were to be followed, an additional conceptual weakness would arise. One cannot eliminate centuries of legal development simply because an inconvenience has resulted.

Common law scholars embarked on a discussion on the position of the beneficiaries at a time when German influence in England and the United States was at its peak. Common law scholars put on robes that were not their own and handled tools with which they were not familiar. They tried to steer a conceptual course instead of a remedial course. A shipwreck ensued and the debris is still there to be seen. Civil law scholars, however, quickly adhered to notions they thought they could simultaneously understand and dismiss, chief among them the notion of equitable ownership.

37. See generally ADAIR DYER & HANS VAN LOON, REPORT ON TRUSTS AND ANALOGOUS INSTITUTIONS (Hague Conference on Private Int'l Law ed., 1982).

38. As is well known, the proposed litigation of *fiducie* was eventually rejected by the French Parliament.

39. See John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625 (1995).

The well-known correspondence between Maitland and von Gierke has been repeated between many common law and civil law scholars, with an additional note: now each of them believes he understands the other, while in reality none of them understands. Common law scholars treat civil law systems as if they shared fundamental legal notions. They do not, however, share such concepts, not even in basic areas such as ownership, testamentary freedom, and rights over the estate of the deceased. Consider, for instance, that fiduciary arrangements serving as collateral to loans whereby the lender takes title to the asset that is the security for the loan are commonly recognized in Germany, and are none other than the oldest form of the medieval mortgage, from whence the present day mortgage derives. Similar agreements are held to be null in the eyes of Italian law, while in France the assignment of receivables to banks by way of security is generally held to be an instance of *fiducie*, and specifically of *fiducie-gestion*.⁴⁰

Civil law scholars, meanwhile, treat trusts as if they all must have beneficiaries or as if their basic function was the management of assets. Neither assumption is true, but civil law scholars believe that both are. Thus, new half-breed concepts such as “economic ownership” emerge.

Civil law scholars tend to use analogies without any foundation, such as regarding the contract in favor of third parties or with the *fideicommissum*. Or, led astray by the unguarded language of common law scholars—who should think twice before uttering the magic words “equitable ownership” in front of civil law practitioners—claim that trusts subvert the framework of real rights,⁴¹ or that the unity of patrimony becomes fragmented. Not one ounce of truth is found in those pronouncements, but one must acknowledge that common law scholars have tried their best to confuse the issues for civil law scholars.

Most dangerously, civil law scholars tend to speak of “the trust” in the singular. Why has no common law scholar or practitioner ever told them that “trusts” in the plural is the only proper approach? A tell-tale bit of linguistic evidence is in the very title of the Hague Convention: the French title is “Convention relative à la loi applicable au trust et à sa reconnaissance,” while the English translation is “Convention on the law applicable to trusts and on their recognition.”⁴² If one thinks in the singular, one cannot avoid the simplistic and trivial approach that is easily discerned in the international arena:

40. This subject is covered by many of the essays collected in *LE TRUST ET AL FIDUCIE; IMPLICATIONS PRATIQUES* (J. Herbots & D. Philippe eds., 1997).

41. While writing the final version of this paper, the two first instances of title to land registered in the names of trustees have occurred.

42. See Convention on the Law Applicable to Trusts and on Their Recognition, *supra* note 1, reprinted in MAURIZIO LUPOI, *INTRODUZIONE AL TRUSTS* app. 1 (1994).

distinctions become blurred and fine points of law are ignored in the desire to achieve clarity that, in the end, breeds obscure creatures that are neither trusts nor civil law structures.

Civil law scholars regard the transfer from settlor to trustee as a gift. Why should that be so? The answer is that common law scholars have made neither an attempt to transcend an elementary approach, nor an effort to be wary of words that could lead to confusion. One such example is the position of the settlor. Why are civil law scholars not clearly made aware that under the typical trust structure the settlor is basically without any remedy against the trustee? They cannot reach this conclusion by themselves because they are unaccustomed to looking at unilateral transfers that leave the transferor without a remedy in case the transferee does not fulfil the terms upon which the transfer was made. The problem is exacerbated when, as in most commercial trusts, the transfer is the consequence or performance of an obligation undertaken by the settlor, not an act of his free will.

One could go on. For example, shifting from the English-model trust to the international-model trust, compare the trusts for purposes of the international model with their English charitable counterpart. One would probably find that words play tricks that academic law scholars should perhaps try to uncover—after all, do we really know what a beneficiary is? If not, how can we assert with any measure of confidence that trusts for purposes are without beneficiaries?

Civil law scholars cannot be satisfied with purely remedial approaches or weak conceptual structures. Common law scholars, on the other hand, must learn the complexities of the civil law systems—here, too, the plural must be used, as in “trusts”—and understand that civil law scholars need a sophisticated conceptual framework to be at ease. For instance, will anyone discuss properly the difference between a nominee and a bare trustee when the settlor and the beneficiary are the same person? And will anyone consider the differences between each of those instances and agency?

The basic reason why trusts are perfectly compatible with civil law structures—and here one must be careful to touch only on general themes that might find proper correspondence in most civil law systems—is that trusts are not centered on beneficiaries, but on trustees; that is, *not on management, but on ownership*. All civil law systems have long known instances in which assets owned by someone are not available to his creditors because they are to be handed over to someone else. One such example is the secret and semi-secret testamentary trust of the European *ius commune*, but many other cases could be quoted. For instance, under the Italian civil code, assets held by an undisclosed agent for his principal cannot be seized by the

agent's creditors.⁴³ Yet the agent purchased them in his own name, and for all intents and purposes he is their sole owner.⁴⁴ The unity of the patrimony—which has scared many a common law scholar in discussions with civil law counterparts—is a recent development in the civil law, dating from the French civil code, and was never meant to cover all that one comes to own. Some things are owned in order to be handed over, whether acquired by the temporary owner for the purpose of managing them or for the purpose of keeping them secure or for whatever other reason. “Temporary ownership” is a known civil law category and now Argentinean law openly speaks of *propiedad fiduciaria*, or fiduciary ownership.⁴⁵ The testamentary trust of the *ius commune* is clear proof of fiduciary ownership. As the Liechtenstein law put it, this type of ownership is enforceable against all the world.⁴⁶ It is a real right, not a matter of obligation. Looking at current law, the *comisión de confianza*, a long-standing institution of commercial law, is still another instance. Other examples also might be given.

Common and civil law scholars alike ought to take a fresh, comparative look at trusts. Hopefully, these comments will yield at least this result.⁴⁷

G. The “Hague Convention” Trusts

The Hague Convention of 1984 did its best, with considerable success, to further confuse the issues. Article 2 of the Convention reads as follows: “For the purposes of this Convention, the term ‘trust’ refers to the legal relationships created—*inter vivos* or on death—by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.”⁴⁸

The phrase “placed under the control” has uncertain boundaries. It does not necessarily imply a transfer of title; certainly, it is not the *divestiture*, the transfer of *gewere* or *seisin*. This is not a purely academic comment. The Convention never addresses the matter of the creditors of the settlor, while it is fastidious on the matter of the creditors of the trustee.⁴⁹ This is not a casual omission, for the structure of Article 2 allows a trust to exist even if the settlor is still regarded as the owner of what a

43. C.c. art. 1707 (Italy).

44. *Id.*

45. See Law No. 24441, Jan. 5, 1995, arts. 1, 11, 13.

46. See *supra* notes 12-13 and accompanying text.

47. Additional submissions to this effect may be found in MAURIZIO LUPOI, *Trusts and Civilian Categories: Problems Spurred by Italian Domestic Trusts*, in ITINERA FIDUCIAE, Duncker & Humblot, Berlin (R. H. Helmholz & R. Zimmermann eds., 1998).

48. Convention on the Law Applicable to Trusts and on Their Recognition, *supra* note 1, art. 2, reprinted in MAURIZIO LUPOI, INTRODUZIONE AL TRUSTS app. 1 (1994).

49. See *id.* art. 11.

common lawyer would call "trust assets."⁵⁰ Thus, a new trust concept was born at The Hague—the "Convention trust" or "shapeless trust."⁵¹ Convention trusts may be commonly found in civil law countries, just as in common law countries. Most management arrangements that do not allow the creditors of the manager to seize the funds he manages are Convention trusts. However, no common law jurisdiction would regard such an arrangement as a trust.

Looking more closely, one finds a clear instance of the comparative deficiencies that were attributed earlier to the current lack of understanding between common law and civil law scholars.⁵² The French text of the Convention tends to "entify" the trust.⁵³ Thus, a subsequent part of Article 2 explains that "*les biens du trust constituent une masse distincte et ne font pas partie du patrimoine du trustee.*" In English, however, the text reads, "the trust assets constitute a separate fund and are not a part of the trustee's own estate." This is not at all the same thing: the French text refers to a separate estate, while the English text refers to the phenomenon of segregation *within* the trustee's estate. The French text excludes the assets in trust from the trustee's estate, while the English text includes them but clarifies that they do not belong to the "trustee's own estate." Here, the controlling word is "own." In Italy, it is currently accepted that the trust assets are owned by the trustee, yet form a separate fund. Thus, Italy has discarded the Québec-like approach in favor of an English-like approach.

III. THE ALLEGED REQUIREMENT THAT TRUSTS MUST BE FOREIGN TO BENEFIT FROM THE HAGUE CONVENTION

A. Choice of Law

The Hague Convention system imposes no limitation on the choice of the law applicable to a trust. In principle, therefore, there is nothing to prevent an Italian or Dutch citizen from creating a trust that is governed by the law of his choice. In particular, there is nothing to prevent all the elements of the trust from being concentrated in Italy or in Holland, and yet have the trust governed by, for example, English law.⁵⁴

50. See *id.* art. 2.

51. *The Shapeless Trust*, 1 TRUSTS & TRUSTEES 15 (1995).

52. See *supra* notes 37-47 and accompanying text.

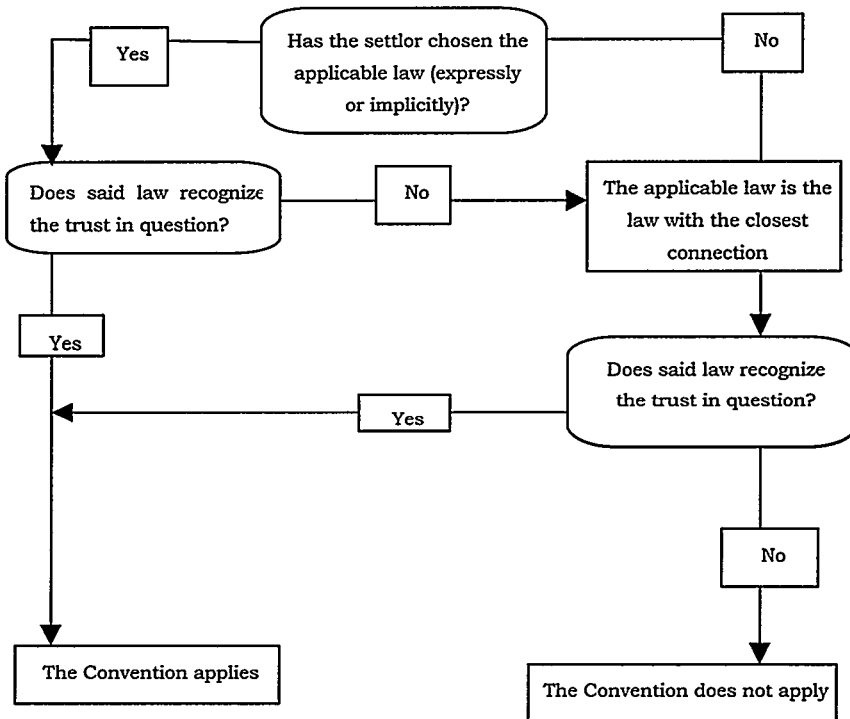
53. Just as under the new Quebec civil code.

54. See Convention on the Law Applicable to Trusts and on Their Recognition, *supra* note 1, art. 6, reprinted in MAURIZIO LUPOI, INTRODUZIONE AL TRUSTS app. 1 (1994).

The main criterion for which the Convention provides is the settlor's choice of law.⁵⁵ Indeed, the many restrictions that some delegations at The Hague attempted to impose on this choice were rejected. Those writers who today would tie the choice of applicable law to objective elements of nexus suggest positions that can no longer be supported, since they were already proposed and expressly rejected at The Hague.

It may happen, expressly or by implication as permitted by Article 6, that the choice of the settlor falls on a legal system that does not define the *negotium* he has created as a trust—as a Convention trust, of course. Even in this case, the choice of the settlor does not lead to the non-application of the Convention, because Article 7 provides that in such a case one looks to the system that offers the closest connection,⁵⁶ as in the case in which the settlor has made no choice, explicit or implicit. If this method does not reveal a law apt to govern the trust, the Convention is not applicable.

Since this interpretative path is confusing, the following simple chart describes the logical steps required.



55. See *id.*

56. See *id.* art. 7.

B. *The Required Foreign Element*

To take the position that the Convention concerns foreign trusts is either self-evident or a dangerous error. It is self-evident in that one cannot speak of recognition in the presence of a legal relationship, the effects and structure of which belong to the national legal system in which recognition is sought. Recognition presupposes the insertion into a legal system of a legal event that would otherwise only operate in a different, and therefore foreign, legal system. It is a dangerous error, on the other hand, if the term "foreign" is given a different meaning and is tied, for example, to the nationality or personal law of the settlor, the place where the trust is administered, the location of the assets, or to other criteria of this kind.⁵⁷ In the system of the Convention, such a foreign trust simply does not exist. Signatory states are obliged to recognize trusts governed by a foreign law, *and it is here that the only required element of foreignness is found.*⁵⁸

The civil law delegates at The Hague based their final defense on the rules relating to recognition, for they had not succeeded in placing limits on the freedom of the settlor to choose the governing law of the trust. Given the general provision on the duty to recognize trusts created on the basis of a law identified pursuant to Articles 6 and 7 of the Convention, there arose a flurry of proposals aimed at preventing recognition in certain cases.

The first objective of five of the civilian delegations was to forbid recognition of trusts whose assets should be located in a state that did not recognize the institution of the trust, and in cases in which settlor and beneficiaries were resident in states that did not recognize it. The Conference, however, would not consider any proposition supporting outright denial of recognition. A second approach suggested an option not to recognize. There was no shortage of proposed solutions. For instance, the Netherlands wanted to reserve to each state the right to declare whether it would recognize trusts when the applicable law was different from the one with which all the other elements of the trust were connected. Italy proposed that recognition would become optional when the state of recognition did not recognize the type of trust in question and did not have a similar institution, the settlor and the beneficiaries were

57. I have examined the debates and the many proposals put forward at The Hague in LUPOI, *supra* note 6, at ch. VI.

58. I would add parenthetically that the terminology "recognition of a trust" is legally unsound. States do not recognize trusts. Rather, they either decide to apply or not to apply a foreign law—the one by which the trust is governed—in their forum.

nationals of and resident in that state, and the trust assets were located there.⁵⁹

In the end, the optional recognition proposal was adopted. Under Article 13 of the Convention, recognition of a trust may be denied when all the significant elements of the trust—apart from the elements the settlor may choose at his pleasure (that is, the applicable law, the place of administration, and the residence of the trustee) are more closely connected with a state whose legal system does not recognize the institution of the trust or the type of trust in question.⁶⁰

The trust to which the Convention refers is not like any known trusts or models of trust. As explained above, the Convention has its own notion of trust, which is set out in Article 2.⁶¹ Trusts within that definition are to be found everywhere, possibly in every legal system. Therefore, states that do not have the institution of the Convention trust probably do not exist.

Recognition—or rather, application of the foreign law by which a trust is governed—may be refused. Under the Convention, however, *recognition is the rule*.⁶² The question remains, however, when should a state decline to follow the Convention?

IV. TRUSTS IN ITALY

A. *The Trust Interno (Domestic Trust) in Principle*

Upon Italy's ratification of the Hague Convention, I suggested that the Convention enabled citizens of ratifying civil law countries to form trusts that, other than for the governing law, were completely connected with a civil law country. I labeled such trusts as *trusts interni*, or domestic trusts.⁶³ Moreover, this author suggested that any provision of a trust instrument in violation of Italian basic rules—for instance, one protecting reserved heirs—would be unenforceable only to the extent required to eliminate the violation, with the trust remaining valid.

This position drew heavy academic opposition and was not understood by most foreign scholars.⁶⁴ However, it found some approval in the professions, especially the banking industry. As

59. I have explored this subject in my essay *Effects of the Hague Convention in a Civil Law Country*, in *THE REFORM OF PROPERTY LAW* (P. Jackson & D. C. Wilde eds., 1997).

60. See generally LUPOI, *supra* note 6, at ch. IV.

61. See *supra* notes 48-53 and accompanying text.

62. See Convention on the Law Applicable to Trusts and on Their Recognition, *supra* note 1, art. 11, reprinted in MAURIZIO LUPOI, *INTRODUZIONE AL TRUSTS* app.1 (1994).

63. See *supra* note 1.

64. See, e.g., Waters, *supra* note 7.

a result, an entity under the name of "Consulta nazionale sui trusts" (Consultative Group on Trusts) was formed, in which the public bodies in charge of the legal, notarial, and accounting and tax advising professions agreed to participate. The Italian Bankers Association and the Association of Fiduciary Companies also became members, as well as three university law departments—Milan (Bocconi University), Genoa, and Perugia.

Under the auspices of the Consulta, a "school of trust" held one-day sessions in thirteen Italian cities in 1997.⁶⁵ Debates flourished and many articles were published in legal journals.⁶⁶ In the last four years, Italy has been the civil law country with the highest number of legal essays on trusts.⁶⁷

Moreover, recently the first judgment handed down after the ratification of the Hague Convention has confirmed both of the above propositions concerning the *trust interno*.⁶⁸

Almost at the same time, Italy's lower Chamber of Parliament passed a law—currently awaiting approval by the Senate—to cope with the conflict of interests of members of the government and other high-ranking officials whenever their net worth exceeds a certain level.⁶⁹ The rule was thus accepted that they either sell their assets or put them in trust. The trust to which Parliament referred is not an Italian trust, but a foreign one; that is to say, a trust governed by a foreign law.

Two more bills are currently before the Italian Parliament—one on the management of trusts generally, the other on trusts for handicapped children.⁷⁰ Both refer to trusts governed by foreign law. Finally, a study group of the Ministry of Finance has issued a preliminary study on the taxation of trusts in Italy and has taken for granted that *trusts interni* are admissible.⁷¹

So far, attempts to create an Italian law on trusts have been thwarted. The time simply is not ripe for such a law. Italians are content to have foreign laws govern their trusts. Parliament in its wisdom has taken this stand and one can only hope that it endures.

The acceptance of the *trust interni* had to meet the challenge of foreign banks and trust companies, as well as foreign professional associations. Such groups are unwilling to change their ways and believe they can make a trust colony of Italy. They shall be welcome only if they understand that Italy is taking the lead in the civil law world in the matter of trusts and that

65. The author was in charge of organizing this event.

66. Over 75 articles have been published in the last four years.

67. And a new journal, TRUSTS E ATTIVITÀ FIDUCIARIE, is about to be published.

68. Trib., *Casani v. Mattei*, Foro it. I 1998, I, 2007, 3391.

69. Senate bill No. 3236 (Italy).

70. Camera dei Deputati (House of Representatives), bills No. 5194 and 5494 (Italy).

71. Advisory Ruling, May 11, 1998, No. 37, fisco, 1998, 11148.

Italy will accept none of their deeds, techniques, structures, and so on without the closest scrutiny. Italy is forging its own tools.

B. *The Trust Interno in Practice*

It is not generally known that trusts are being formed in Italy, by means of Italian deeds, usually before an Italian notary and often with Italian trustees. Foreign trust companies are seldom involved. The trust assets are located in Italy and funds are kept in Italian banks. Incidentally, Italian banks are going to great lengths to alter their practice and accommodate trust accounts—a practice hitherto unknown in Italy. As a result, it is much simpler for a trustee to open a bank account in Italy than in, for example, Switzerland.⁷²

Standard trust forms thus are at the same time inappropriate and damaging in a civil law setting. It requires little examination to realize that they are based on legal assumptions that are simply untrue or, worse, illegal in a different legal culture. They had to be written anew. Read in Italian, they have a strange flavor for a common law practitioner. The *trust interno* instruments are couched in terms that are understood by a civil law practitioner and yet are in accord with the governing law of the trust, for instance English or Jersey law. Thus, they embody the civil law rendering of foreign rules. Moreover, the *trusts interni* include provisions that would be unnecessary under the governing law of the trust, as well as others that cope with the legal rules affecting the operation of the trust and are peculiar to the civil law country with which all the components of the trust are connected.

Many of the techniques prevailing abroad are of little use in Italy—and probably, in many civil law countries—and at times they are so inadequate, and yet forcefully proposed, that major disadvantages ensue. One example is found in a booklet issued in Italian by a leading London law firm.

The booklet describes the case of the owner of a *palazzo* in Venice who wishes to settle his *palazzo* for his children. The London firm advises that the owner contribute the *palazzo* to a company and to settle the shares of the company into a trust of which the settlor will be the beneficiary for life. While life estates are no longer allowed at common law, Italian law certainly permits them.⁷³ A trust is not necessary to grant a life estate over Italian land. Actually, all that is required is that the settlor retain the life estate when transferring the land. He will thus enjoy the *palazzo* in his own right and the trustee will hold what at common law used to be the remainder. This arrangement is much more sensible—and a more tax-effective one—and shows

72. Italian law does not have an institution similar to the German *Anderkonto*.

73. It is the Roman institution of the *ususfructus*.

how trusts in Italy are not following the traditional lines sponsored by foreign consultants and, incidentally, why foreign consultants often are of little use.

The fresh look at trust advocated above has become a current engagement of many law scholars in Italy. Some of their results are summarized below.

First, a clear line has been drawn between the trust instrument and the transfer of assets to trustees. The trust instrument is regarded as a program laid down by the settlor, a mere statement of intention, or a binding obligation. Indeed, there are instances in which the settlor forms a trust to discharge an obligation. In order to keep in line with standard English practice, an initial transfer is made at the same time as the execution of the trust instrument, but the bulk of the trust fund is transferred to the trustees at a later date. There are also tax reasons that favor this technique.

Second, most if not all *trusts interni* are made before a notary,⁷⁴ because Italian law gives great weight to the certainty of the date of an instrument and the paramount method to achieve that certainty is to have a notary witness the execution of the instrument. This emphasis, however, raises serious problems because Italian notaries, as generally were Latin notaries, take responsibility for the validity of any act passed in front of them. Therefore, they must be satisfied that the instrument is valid under the foreign law by which it is governed. At times, the opinion of a foreign lawyer is obtained, although since the instruments are in Italian, it is not easy to find foreign law scholars able to give their opinion.

Third, Italy's requirements as to form and to the certainty of the date transcend the trust instrument. They affect, for instance, the appointment of new trustees. Hence, Italian practice developed a set of rules that are inserted in the trust instruments in order to assure anyone dealing with a trustee that he is actually the trustee of that trust. For instance, the "Register of Trust Events," a book kept by the trustee of a trust and handed over to his successor, was devised. In it, the trustee records any fact and inserts copies of any document that is relevant to the trust. Of course, a memorandum by a trustee is a well-known common law technique, but then one encounters the difficulty of discerning what constitutes a trust document. Here the answer is clear: the book itself is a trust document.

Fourth, although trusts can obviously be made revocable, Italian practice is against revocability. Old biases die hard and the aura of law-avoidance that unhappily still surrounds trusts in civil law countries would find new strength in revocable trusts.

Fifth is the liability of the trustee. At times, Italian trust instruments make clear that negligence and conflicts of interest

74. At times, when confidentiality reasons prevail, before a foreign notary, requiring the international Apostille.

are to be assessed under the rules of Italian law. Specific guidelines as to the standard of diligence are often set in trust instruments. Trustees, as mentioned above, are mainly Italian professionals. In some instances, fiduciary companies have agreed to serve as trustees. Oddly enough, no Italian bank has yet developed any trust business.

Sixth is the position of the protector. Italy frowns upon sham trusts and, as it were, near-trusts. In spite of what many international consultants advise, Italian settlors fully understand that all the advantages a trust can bring about stem from the fact that it is a real trust. Therefore, protectors are neither used to curtailing unduly the powers of trustees nor to bringing the settlor back into the management of the trust assets under a new name.

Seventh, Italian practice strongly stands against the retention of any rights or powers by the settlor, notwithstanding that it fits within the Hague Convention and, of course, the applicable law. The reason is the same as for the irrevocability of Italian trusts: we must steer clear of muddy waters. In Italy, settlors say a final farewell to whatever they transfer to trustees. Nevertheless, Italian practice has developed clauses under which the trustees of family trusts must give due consideration to any financial need of the settlor and act in this respect as they see fit.

Eighth is the protection of the trust assets. Contrary to English practice, Italian trustees are actually required to register their title to land as trustees and to appear in shareholders' registers as trustees.⁷⁵ The same is true for bank accounts. Under Italian rules on notice, it is of paramount importance that the existence of the trust be made known in every possible way.

Ninth is the nature of the transfer to trustees. Italian law draws a distinction between gratuitous transfers and liberal transfers. A gratuitous transfer might not be liberal in nature, while conditions may be attached to a liberal transfer that would amount to a consideration in the eyes of the common law and thus enter the realm of contracts. These concepts are all-important in succession matters. The reserved heirs can only claim against liberal transfers, which are not necessarily what the common law would call "gifts." Here again, a comparative approach is hardly unnecessary.

Tenth, it is not unknown for a trust instrument to split jurisdiction. While the courts of the state whose law governs the trust are given general jurisdiction, Italian courts are at times selected for the removal of a trustee or giving direction to trustees.

Finally, the many *trusts interni* formed in the last three years span from commercial to financial to family matters and have

75. That is made possible by article 12 of the Hague Convention, *supra* note 1, reprinted in MAURIZO LUPOI, INTRODUZIONE AL TRUSTS app. 1 (1994).

often settled assets of no great magnitude. This is most important, for trusts are meant to become a tool in everyday life.

V. CONCLUSION

The Italian outlook does not share the international consultants' view that trusts are intended to manage wealth or provide a more favorable tax setting. None of the *trusts interni* has had tax planning as its foremost consideration; few of them have been formed to *manage* wealth.

Many *trusts interni* are formed for so simple a structure as an escrow account. In Italy, as in some other civil law countries, one cannot segregate fungible goods, especially money. A foreigner who thinks he has set up an escrow account in Italy with his lawyer or with a bank has in fact done no such thing. It takes a trust to create an escrow account. And what about deposits and part payments? They, too, become an asset of the person to whom they are given—unless, that is, a *trust interno* has been created.

Trusts will allow Italian legal scholars to devise arrangements that, far from being prohibited, are simply ignored by Italian domestic law in spite of a clear need for them in commercial as in family matters. Arrangements of this sort call for a thorough knowledge of the foreign law that will govern them and of one's own law that will govern their operation and most of their effects. The future of trusts in civil law countries will be assured if, far from aping foreign techniques, civil law scholars rise to this challenge.